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No. 83-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; and MERICAN CURTIS, LTD.,
Petitioners,

v.

CATERPILLAR TRACTOR CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Third Circuit (a) correctly conclude that the doctrines of *Illinois Brick* and "antitrust standing" are analytically distinct and (b) correctly apply the rule of *Illinois Brick* and its underlying principles to the facts of this case thus barring the damage claims of indirect purchasers alleging injury from the passing on to them of overcharges they claim were imposed upon their suppliers by the manufacturer?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction and Summary

In this antitrust case, respondent Caterpillar Tractor Co.[1] ("Caterpillar") was sued by three indirect pur-

[1] In accordance with Rule 28.1 of this Court, the following entities are subsidiaries or affiliates of Caterpillar that are not wholly-owned: Turbinas Solar do Brasil Ltda.; Turbotronic Controls Corporation; P.T. Natra Raya; Health Plan of Central Illinois, Inc.; S.A. Fonderies et Acieries de Paris Seine; Caterpillar Mitsubishi Ltd.; Tractor Engineers Ltd.; Conek S.A. de C.V.; Turbinas Solar S.A. de C.V.; and Equipment Financing Associates.

chasers of Caterpillar electric generator sets seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, for an alleged violation of section 1 of the Sherman Act, 15 U.S.C. § 1.[2] The plaintiffs (petitioners here) purchased Caterpillar electric generator sets not from Caterpillar, but from various independent authorized Caterpillar dealers at a price determined individually and unilaterally by each dealer. Plaintiffs then resold the generator sets to other distributors and retail resellers in the Middle East who sold the sets to the users.[3]

Plaintiffs allege their injury occurred when Caterpillar, under the terms of its distribution agreements with authorized dealers, ceased permitting the dealers to retain the five percent warranty service fee ("interterritorial service fee" or "ISF") on their sales of Caterpillar products that received their "initial substantial use" outside the selling dealer's service territory, since the selling dealer had no warranty service obligation as to these sales and thus did not earn any right to the service fee. Plaintiffs allege that the warranty service provisions of Caterpillar's distribution agreements impose an illegal "overcharge" on the selling Caterpillar dealers. Plaintiffs' claim of injury and damages is based on their contention that the selling Caterpillar dealers passed on to them some portion of this allegedly illegal overcharge in the form of higher prices.

Caterpillar moved to dismiss or for summary judgment on plaintiffs' damages claim on the ground that, even if plaintiffs could prove the allegations of their amended complaint, they were not "persons injured" by the alleged antitrust violation within the meaning of sec-

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[2] Plaintiffs also sought injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26. The validity of this claim has not been ruled on by the courts below.

[3] *See* chart *infra* at p. 8.

tion 4 of the Clayton Act under the rules of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Plaintiffs did not dispute that they were indirect purchasers of Caterpillar products whose only claim of economic injury arose when and if a direct-purchasing Caterpillar dealer decided to pass on to them some portion of the allegedly illegal overcharge Caterpillar is claimed to have imposed upon its dealers. Plaintiffs instead argued that because they were within the "target area" of the alleged illegal restraint (and hence had "standing") the rule of *Illinois Brick* and *Hanover Shoe* was inapplicable. The District Court essentially adopted petitioners' argument and denied Caterpillar's motion, but certified an immediate appeal pursuant to 28 U.S.C. § 1292(b).

The Third Circuit reversed. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983) (Pet. App. A).[4] The Court of Appeals first recognized that the limitation on the treble damage remedy articulated by this Court in *Illinois Brick* and *Hanover Shoe* is analytically distinct from the concept of "antitrust standing" on which plaintiffs relied. The Court then analyzed the facts alleged in plaintiffs' amended complaint[5] in light of the principles underlying this Court's *Illinois Brick* decision and concluded that plaintiffs' damages claims were barred under *Illinois Brick*. 713 F.2d at 966-69 (Pet. App. A at 15-23). Plaintiffs have petitioned this Court for a writ of certiorari to review the application of *Illinois Brick* to the factual circumstances of this case. (Pet. at 13.)

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[4] The Third Circuit's Slip Opinion is reprinted in plaintiffs' Petition to this Court at Appendix A, cited herein as "Pet. App. A at ——."

[5] The Court properly assumed plaintiffs could prove the facts they alleged. 713 F.2d at 965, 966 n.18 (Pet. App. A at 14).

B. The Undisputed Facts [6]

1. *Distribution of Caterpillar Products*

While Caterpillar's principal products are heavy earth-moving equipment and construction machinery, this case involves only electric generator sets,[7] which the company also designs, manufactures, and markets. (App. 8B-9B). Caterpillar distributes its products, including electric generator sets, through a worldwide network of authorized dealers who function generally as retail sellers of Caterpillar products. (App. 9B.) Each dealer is an independently owned and operated business that has entered into a Distribution Agreement with Caterpillar. (App. 9B, 32C.)

The Distribution Agreement provides, among other things, for the promotion, distribution, installation and servicing of Caterpillar-manufactured products by the dealers. (*Id.*) The Agreement also identifies for each dealer an area of service responsibility in which the dealer agrees to maintain one or more suitable places of business; maintain adequate service facilities; employ trained salesmen to market Caterpillar products; and employ trained technicans to render prompt, competent, diagnostic and mechanical service to users of Caterpillar products. (App. 33C-36C.) Most importantly for pur-

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[6] Citations in this brief to the supporting record refer to the parties' Joint Appendix to the Third Circuit, cited "App. ——."

Caterpillar is constrained to point out that the statement of "facts" set forth in plaintiffs' petition, particularly at pp. 4-12, contains numerous mischaracterizations of various documents in an apparent effort to show that plaintiffs were the "target victims" of an alleged conspiracy. While Caterpillar need not contest this point for present purposes, Caterpillar has vigorously denied that any conspiracy existed, or that its distribution agreements with its authorized dealers are in any way contrary to the antitrust laws.

[7] An electric generator set typically consists of a diesel engine, a generator, a battery, a governor and transfer switches. It is used mainly to provide "prime" power to buildings and clusters of buildings without access to central power sources and to provide "standby" power to hospitals, schools or other buildings.

poses of this litigation, each dealer also agrees to provide—free of charge to the user—delivery, inspection, and warranty services with respect to all Caterpillar products that receive their "initial substantial use" in that dealer's service territory, regardless of when, where, or by whom the products were sold. (App. 34C.)

On its part, Caterpillar agrees to sell its products, including generator sets, to its dealers at a maximum discount of twenty-five percent off the published Caterpillar list price. (App. 58C-60C.) Of the twenty-five percent discount, five percent is allocated by Caterpillar as reasonable compensation for each dealer's undertaking the responsibility of providing free delivery, inspection, and warranty services on products that receive their "initial substantial use" in that dealer's service territory. (App. 43C-44C, 63C, 135E-36E.)

2. *The Interterritorial Service Fee ("ISF")*

If a dealer sells a generator set that receives its initial substantial use in the dealer's own service territory, he (the "selling dealer") is responsible for providing delivery, inspection, and warranty services free of charge to the user. (App. 33C-36C, 43C-44C, 63C-65C, 135E-36E.) In that situation, the selling dealer is entitled to receive the full twenty-five percent discount, including the five percent allocated as compensation for assuming the responsibility of providing those services. (*Id.*) If, however, a selling dealer sells a generator set that receives its initial substantial use in the service territory of a second dealer ("servicing dealer"), the selling dealer is not obligated to provide delivery, inspection, and warranty services and thus is not entitled or permitted to keep the five percent discount originally allowed by Caterpillar as compensation for assuming those obligations. (*Id.*) Under the Distribution Agreement, as soon as it becomes known that a generator set sold by one dealer will receive its initial substantial use in another dealer's service

territory, the selling dealer is required to return to Caterpillar the five percent portion of the twenty-five percent trade discount allocated for delivery, inspection, and warranty service obligations. (*Id.*) Likewise, the Distribution Agreement obligates Caterpillar to pay the five percent ISF to the servicing dealer upon the filing of an appropriate claim. (*Id.*)

Since July 1978, Caterpillar has insisted that each of its dealers comply with the contractual provisions of the Distribution Agreement requiring payment of ISFs to Caterpillar as soon as it becomes known to the selling dealer that the generator set will receive its initial substantial use in a second dealer's service territory. (App. 15B-16B.) In addition, Caterpillar notified its dealers in February 1980, that it had discontinued its past practice of returning to the selling dealer any warranty service fees not ultimately earned by the dealer with service responsibility. (App. 135E-36E.) These changes in Caterpillar's administration of ISFs applied to all Caterpillar products (not just electric generator sets) and to all Caterpillar dealers. (*Id.*)

3. *Plaintiffs/Petitioners*

Plaintiffs Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd., along with several other affiliated companies, are general "trading" companies, formed during the mid-1970's, engaged in buying and reselling a wide range of products, including detergents, cosmetics, canned vegetables, and dairy products, as well as Caterpillar electric generator sets. (App. 137E, 156E-57E.) No plaintiff manufactures electric generator sets and no plaintiff has ever entered into a Distribution Agreement or any other agreement with Caterpillar. (App. 127E-28E.) Thus, no plaintiff has ever paid Caterpillar an ISF and no plaintiff has ever been obligated to do so. (*Id.*) Indeed, insofar as is pertinent here, no plaintiff has pur-

chased any products from Caterpillar, or had any business dealings with it. (App. 138E-43E.)

Plaintiffs did purchase Caterpillar-manufactured generator sets from various independent Caterpillar dealers, including principally Ohio Machinery Co. ("OMCO") a dealer located in Cleveland, Ohio. (App. 11B-12B, 261G-62G.) In each year from 1978 through 1981, plaintiffs purchased an increasingly greater number of electric generator sets from OMCO.[8] (App. 261G) In the fall of 1981, when plaintiffs' business was still strong, they left the business of brokering Caterpillar electric generator sets by selling to their principal supplier OMCO their entire relationship with their principal customer Rabiah & Nassar Co. ("RANCO") a retail-level reseller in Saudi Arabia who, plaintiffs allege, competed for sales with Zahid, Caterpillar's authorized Saudi Arabian dealer. (Pet. at 11; App. 14B, 111E-12E, 265G.) A chart depicting the distribution channels through which Caterpillar electric generator sets reach ultimate users in the Middle East and elsewhere is set forth below.[9]

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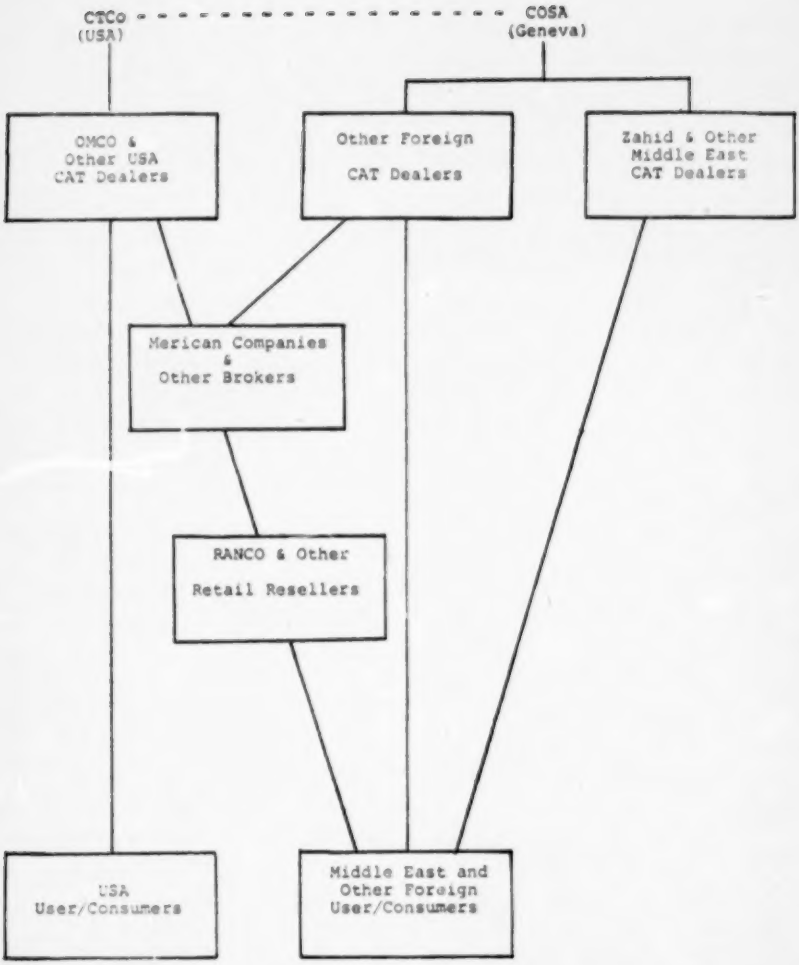
[8] As plaintiffs complain of restraints that allegedly began in 1978 and 1980, it is noteworthy (and undisputed) that plaintiffs' unit sales actually increased an average of 130 percent in *each* year between 1977 and 1981, reaching an all-time high in 1981, long *after* the imposition of the alleged restraint, and more than 650 percent higher than their 1977 pre-"restraint" sales. *See* App. 79D, 261G.

[9] The chart is based on undisputed facts. Caterpillar-manufactured generator sets are sold by Caterpillar ("CTCo.") to authorized dealers in the U.S., such as OMCO, or by Caterpillar's Swiss subsidiary, Caterpillar Overseas, S.A. ("COSA") to authorized foreign dealers in Europe, Africa, or the Middle East (such as Zahid). In the normal course, the authorized dealers sell generator sets directly to user/consumers. At times, middlemen/brokers, such as the Merican plaintiffs, are able to buy profitably from a dealer located in one part of the world for resale to other broker/dealers or user/consumers in another part of the world. The plaintiffs here resold sets purchased in the U.S. and elsewhere to retail-level dealers such as RANCO located in the Middle East, who ultimately sold to users.


CTCo
(USA)
COSA
(Geneva)
OMCO &
Other USA
CAT Dealers
Other Foreign
CAT Dealers
Zahid & Other
Middle East
CAT Dealers
Merican Companies
&
Other Brokers
RANCO & Other
Retail Resellers
USA
User/Consumers
Middle East and
Other Foreign
User/Consumers
key
COSA-Caterpillar Overseas, S.A.
CTCo-Caterpillar Tractor Co.
Merican -Merican Curtis Ltd.
Companies -Merican Curtis, Inc.
-Merican Inc.
OMCO-Ohio Machinery Co.
RANCO-Rabiah & Nasser Co.
Zahid-Zahid Tractor Co.

4. *Plaintiffs' Claims*

Petitioners claim that Caterpillar's five percent ISF, which is applied only to authorized Caterpillar dealers who do not in fact assume any obligations to provide warranty or delivery service on products they sell, is an unlawful overcharge that constitutes an "unvarnished penalty" on those dealers.[10] They further allege that Caterpillar's method of administering the ISF since 1978, and especially since 1980, was the product of a conspiracy between Caterpillar and its authorized Saudi dealer, Zahid, the object of which allegedly was to prevent RANCO (plaintiffs' main Saudi customer) from competing with Zahid. (App. 9B-18B) The essence of their claim is that, pursuant to the alleged conspiracy with Zahid, Caterpillar imposed the five percent ISF on all its authorized dealers. (App. 16B-19B.) Petitioners' own injury, they claim, arises from the fact that OMCO and other Caterpillar dealers passed on to them all or part of the five percent ISF (*id.*), thereby reducing their profit margins. (App. 16B-17B, 20B.)

C. The District Court's Ruling

On these and other undisputed facts, Caterpillar moved in the district court to dismiss plaintiffs' claims for money damages under the rule of *Illinois Brick*. Caterpillar's motion was in no way based upon the analytically distinct principles of antitrust standing. Indeed, for purposes of its motion, Caterpillar assumed that plaintiffs had "antitrust standing." Nevertheless, plaintiffs argued that *Illinois Brick* could not apply to bar their suit because they had "antitrust standing" insofar as they were arguably within the area of the economy threatened by any breakdown of competitive conditions, and they were among the "targets" of the alleged conspiracy. (App. 429I-31I.)

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[10] Answers of Merican Inc., *et al.*, to Defendant's First Set of Interrogatories at 164.

Despite the undisputed fact that plaintiffs were indirect purchasers making claims based solely on the pass-on of an allegedly unlawful overcharge through the chain of distribution, the district court did not apply the rule of *Illinois Brick*. The district court ruled that this Court's then-recent decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), somehow operated as a limitation on *Illinois Brick*. According to the district court, since plaintiffs had "standing" under the Third Circuit's "target area" test, this Court's holdings in *Illinois Brick* and *Hanover Shoe* could not bar plaintiffs' claims.

D. The Third Circuit Decision

The Third Circuit reversed. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983) (Pet. App. A). Both the majority and dissenting opinions recognized

> that the district court misconstrued the inquiry to be conducted under the rule of *Illinois Brick*. The issue is not whether Appellees have sustained injuries too remote to give them standing or whether they are the direct targets of an alleged conspiracy, but whether they are in the class of persons considered to be injured in their business or property under section 4 [of the Clayton Act] by an antitrust violation.

713 F.2d at 966 (Pet. App. A at 15); *see also id.* at 970 (Pet. App. A at 23). After an exhaustive analysis of the facts alleged by plaintiffs and the applicable decisions of this Court, the Court of Appeals concluded:

> [B]ased on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act by operation of the rule of *Illinois Brick*. The possibility of duplicative recovery if the direct purchaser brings suit and the potential for complex apportionment of damages lead us to conclude that Appellees are not persons injured

> in their business or property by reason of a violation of the antitrust laws within the meaning of section 4.

713 F.2d at 969 (Pet. App. A at 22).

REASONS FOR DENYING THE WRIT

The Third Circuit's decision conflicts with no decision of this Court and with no decision of any other circuit; it presents no question warranting review. The Third Circuit correctly held, in accordance with all applicable decisions of this Court, that *Illinois Brick* involves issues that are analytically distinct from those involved in determining antitrust standing. The Third Circuit also correctly applied the rule of *Illinois Brick* in concluding that, on the facts of this case, these indirect purchasing plaintiffs claiming damages by virtue of a passed-on overcharge are precluded from pursuing treble damage claims because the risk of duplicative recovery is clearly present and also because of the complex problem of apportionment of damages.

Rather than presenting "important questions of antitrust law" as plaintiffs contend (Pet. at 14), this case involves a straightforward application of settled principles to the particular facts of this case. It reflects the Third Circuit's careful "exercise of judgment in deciding whether the law affords a remedy in [these] specific circumstances." 713 F.2d at 965 (Pet. App. A at 13) (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 908 (1983)). Certiorari is unwarranted, and the petition should be denied.

A. The Third Circuit Correctly Stated the Applicable Law as Set Forth by This Court's Decisions

Petitioners assert that the Third Circuit's opinion "cannot be reconciled" with this Court's decisions in *Blue Shield* and *Associated General Contractors* (Pet. at 17, 23), but they never explain how the Third Circuit devi-

ated from those decisions, which involved only the question of antitrust standing and not the applicability of *Illinois Brick* to indirect purchasers attempting to assert pass-on damage claims.[11] Instead, petitioners argue once again that their alleged status as "targets" of the claimed restraint provides them with antitrust standing and somehow exempts them from the clearly applicable rule of *Illinois Brick*. (Pet. at 17-27.) At most, plaintiffs' argument concerning *Blue Shield* and *Associated General Contractors* addresses a point that is not at issue here and that Caterpillar has not contested—namely, that a plaintiff who is not attempting to make offensive use of a pass-on theory may be accorded standing to maintain suit under section 4 by making a sufficiently direct claim for damages as an antitrust "target victim." The Third Circuit did not rule that plaintiffs cannot maintain this suit because they lack standing.

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[11] While this Court in *Blue Shield* discussed the policies underlying *Illinois Brick* as they might bear on the issue of standing, there was no issue of *Illinois Brick*'s direct applicability, since the plaintiff subscriber was a direct purchaser who was not complaining that some entity between her and the insurance company had passed on to her an unlawful overcharge. Indeed, the only question presented in *Blue Shield* was whether the subscriber was too remote from the alleged violation to be accorded standing. 457 U.S. at 465, 476.

In *Associated General Contractors*, the issue was whether a union claiming to be the intended victim of a contractors' conspiracy to coerce third parties to enter non-union contracts had standing to maintain a suit under § 4 of the Clayton Act. Again, the Court discussed the policies underlying *Illinois Brick* as they relate to the issue of standing. However, the union in *Associated General Contractors* was not claiming damages by virtue of an allegedly passed-on overcharge so as to implicate the rule of *Illinois Brick*. Indeed, in holding that a plaintiff's bald assertion of "target victim" status is insufficient even to provide standing, *Associated General Contractors* fully supports the conclusion of the Third Circuit that such an assertion is insufficient to exempt these plaintiffs from the rule of *Illinois Brick*. *See Associated General Contractors*, 103 S. Ct. at 908 n.37, 913.

Nor did the Third Circuit fail to consider the extent to which *Blue Shield* and *Associated General Contractors* bear on the policies underlying *Illinois Brick*. Rather, the Third Circuit carefully analyzed these cases, as well as the holding and policies of *Illinois Brick* itself, in concluding that "standing" and the rule of *Illinois Brick* are analytically distinct concepts that limit the section 4 remedy in different ways. 713 F.2d at 963-65, 966 n.19 (Pet. App. A at 8-15). "Standing" is akin to "proximate cause." Determining standing involves inquiry into "whether a particular injury is too far removed from an alleged violation to warrant a section 4 remedy." 713 F.2d at 964 (Pet. App. A at 11) (footnote omitted). To make this determination, a court must analyze the specific factual situation in light of "the causal connection between an antitrust violation and the injured party, the nature of the plaintiff's alleged injury, and the directness or indirectness of the asserted injury." 713 F.2d at 964-65 (Pet. App. A at 12) (footnotes omitted) (citing *Associated General Contractors*, 103 S.Ct. at 907-13 and *Blue Shield*, 457 U.S. at 478.)[12]

The rule drawn from *Illinois Brick* and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), on the other hand, recognizes "that there are certain classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of 'private attorneys general' Congress created to enforce the antitrust laws under section 4." 713 F.2d at 963 (Pet. App. A at 9-10); *accord*, *Blue Shield*, 457 U.S. at 473-75.

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[12] The Third Circuit also noted, correctly, that analysis of the directness or indirectness of the asserted injury for purposes of standing implicates many of the concerns identified in *Illinois Brick*, such as the existence of other classes of persons potentially motivated to redress an alleged violation, the speculative nature of damages resulting from indirect effects of an alleged violation, and the danger of complex apportionment of damages. 713 F.2d at 965 n.15 (Pet. App. A at 12) (citing *Associated General Contractors*, 103 S. Ct. at 910-12).

Analysis under this limitation must focus on the policies this Court articulated in *Illinois Brick*:

> First, it "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield*, [457 U.S. at 474-75,] 102 S. Ct. at 2546. Second, it sought to avoid burdening § 4 actions with damages issues giving rise to the need for 'massive evidence and complicated theories'. . . . . *Id.* at n.11.

713 F.2d at 963-64 (Pet. App. A at 10) (footnote omitted). The Third Circuit accordingly held, as has every other court to have considered the question, that where a plaintiff seeks damages based on a pass-on theory, he may be barred by *Illinois Brick* from maintaining a suit for money damages under the antitrust laws.

This conclusion was mandated by *Illinois Brick* itself and is entirely consistent with *Blue Shield* and *Associated General Contractors*. In *Illinois Brick*, the district court dismissed the complaint on the ground that the injuries of the indirect-purchaser plaintiffs were too remote to give them standing to sue. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461, 468 (N.D. Ill. 1975). On appeal, the Seventh Circuit also analyzed the case as turning on the standing issue, but ruled, as plaintiffs urge here, that the indirect purchasers were entitled to sue for pass-on damages because they were within the "target area" of the antitrust violation alleged. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1167 (7th Cir. 1976). This Court reversed, holding, on the basis of *Hanover Shoe*'s rule that direct purchasers are injured to the full extent of the overcharge, that the indirect purchaser plaintiffs were not "persons injured" within the meaning of section 4, and thus were not within the group of private attorneys general created by Congress to redress alleged antitrust violations. *Illinois Brick*, 431 U.S. at 746. In so holding,

this Court made absolutely clear that its ruling did not depend on whether the plaintiffs had "standing":

> Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F.2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

431 U.S. at 728 n.7. This Court expressly reaffirmed in *Blue Shield* that standing is "[a]nalytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*." 457 U.S. at 476.

The Third Circuit's conclusion was inescapable that the district court erred in making only an analysis of plaintiffs' standing, rather than applying the analytically distinct analysis required under *Illinois Brick*. 713 F.2d at 966, 970 (Pet. App. A at 14-15, 23). Plaintiffs' assertion in their petition notwithstanding, the Third Circuit's statement of the applicable law is entirely consistent with this Court's decisions, and it affords no basis for review by certiorari.

B. The Third Circuit's Application of the Rule and Principles of *Illinois Brick* to the Facts of this Case Was Correct and Does Not Warrant Review by this Court

Petitioners also seek to have this Court review the application of *Illinois Brick* to the facts of this case, claiming that "the Court of Appeals misapplied *Illinois Brick*." (Pet. at 14.) Certiorari is unwarranted, however, because the application of *Illinois Brick* here is strictly limited to the instant facts, and does not provide a rule of general application or an important question of law meriting this Court's review. *See* Supreme Court Rule 17.1(c). More importantly, the Third Circuit's application of *Illinois Brick* here is clearly correct and in

complete accord with the holding and principles of *Illinois Brick* and *Hanover Shoe*.

In applying *Illinois Brick* to bar plaintiffs' damage claims, the Third Circuit was guided by this Court's teaching that limitations on the section 4 remedy are not hard and fast rules, but rather are principles "that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 713 F.2d at 965 (Pet. App. A at 13) (quoting *Associated General Contractors*, 103 S.Ct. at 908); *see also Blue Shield*, 457 U.S. at 472. Accordingly, the Third Circuit was careful to confine its analysis, and limit its holding, to the specific facts of this case:

> We hold that, based on facts alleged in their complaint, Appellees are barred from seeking treble damages under section 4 of the Clayton Act. . . . Our analysis is tempered by our recognition that the antitrust laws are written broadly to ensure rigorous enforcement of congressional policy. On the facts of this case, however, we find that the policies underlying *Illinois Brick* preclude Appellees from maintaining suit.

713 F.2d at 969 (Pet. App. A at 22-23). This limited decision is not only wholly proper, but inescapable, on the facts of this case.

First, it is undisputed that plaintiffs are indirect purchasers. They did not purchase Caterpillar products from Caterpillar at prices set by Caterpillar; they purchased from independent Caterpillar dealers at prices determined by each dealer.[13]

Second, plaintiffs are plainly attempting to assert a pass-on theory of injury and damages. Their only claim of economic injury is that they paid higher prices for Caterpillar electric generator sets after Caterpillar ceased al-

[13] It is undisputed that the prices plaintiffs paid were independently negotiated on a transaction-by-transaction basis. (App. 111E.)

lowing its dealers to retain warranty service fees that were not earned by those dealers. According to plaintiffs, the dealers took into account the allegedly illegal overcharge imposed on them by Caterpillar when they decided how much to charge plaintiffs for generator sets. (App. 129E.) Under plaintiffs' theory, they would suffer no injury from Caterpillar's allegedly illegal overcharge unless an independent Caterpillar dealer decided to pass on some portion of the ISF to plaintiffs.

Although these facts alone are sufficient to bring plaintiffs' claims within the proscription of *Illinois Brick*, the Third Circuit went further and analyzed the facts of this case in light of the principles and policies underlying the *Illinois Brick* rule.[14] The analysis confirms that plaintiffs are properly barred from seeking treble damages under section 4.

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[14] Initially, the Third Circuit rejected petitioners' argument that the rule of *Illinois Brick* did not apply to vertical restraints, but instead applied only to horizontal restraints. 713 F.2d 967-68 (Pet. App. A at 17-19). The Third Circuit recognized that *Hanover Shoe*, which spawned the *Illinois Brick* decision, was itself a vertical restraint case charging monopolization, not horizontal price-fixing. Thus, the Third Circuit held, as has every other court of appeals that has addressed the issue, that the applicability of *Illinois Brick* depends not on a plaintiff's characterization of the illegal activity as being horizontal or vertical, but rather on whether allowing assertion of the pass-on theory could create the possibility of duplicative and overly complex damage claims that this Court refused to allow in *Illinois Brick*. 713 F.2d at 967-68 (Pet. App. A at 18-19). *Accord, Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir. 1982); *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

In this case plaintiffs have used a number of labels to characterize their claim, which they have variously described as "horizontal," "vertical" and "a boycott." *See* Brief of Appellee to the Third Circuit at 4-6. The labels affect neither the fundamental pass-on nature of plaintiffs' claims nor the policy reasons for barring their suit under *Illinois Brick*.

As the Third Circuit recognized, the possibility for duplicative recovery is clearly present in this case. 713 F.2d at 968-69 (Pet. App. A. at 19-21). If, as plaintiffs contend, the ISF amounts to an illegal "penalty" or "overcharge," then Caterpillar's authorized dealers, including plaintiffs' main supplier OMCO, have a claim for damages based on purchases of goods subject to the ISF "overcharge." Under *Illinois Brick* and *Hanover Shoe*, if OMCO were to sue Caterpillar alleging that it was overcharged by virtue of the unlawful "penalty" alleged in plaintiffs' complaint, Caterpillar would not be permitted to show that OMCO passed on any such "penalty" to its customers, such as plaintiffs. *Illinois Brick*, 431 U.S. at 746-47; *Hanover Shoe*, 392 U.S. at 487-94. Thus, were plaintiffs allowed to evade *Illinois Brick* by asserting the passing-on theory offensively, Caterpillar would face the substantial likelihood of duplicative recoveries and potentially inconsistent adjudications.[15] Moreover, if plaintiffs were allowed to evade *Illinois Brick* there would be no reason why other downstream purchasers in the chain of distribution, such as RANCO, RANCO's customers, and others similarly situated could not also assert treble damage claims arising from the very same transactions as plaintiffs. All such purchasers could assert the same basic claim that, but for the pass-on of the ISF, they might have paid lower prices. The Third Circuit recognized that such a result is what this Court

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[15] Petitioners assert that an affidavit submitted by OMCO's president in connection with a jurisdictional issue shows that OMCO's chance of successfully suing Caterpillar is "infinitesimal." (Pet. at 22.) Apart from the fact that petitioners mischaracterize and draw unwarranted conclusions from the OMCO affidavit (which was submitted to show that the alleged "restraint" had had no anticompetitive effect on U.S. or foreign commerce), this Court has made it clear that the application of *Illinois Brick* to bar an indirect purchaser's pass-on suit does not depend on the likelihood that the direct purchaser will sue, but rather on the policy determination that direct purchasers are more appropriate enforcers of the antitrust laws. *Illinois Brick*, 431 U.S. at 746.

sought to avoid through application of the *Illinois Brick* rule. 713 F.2d at 969.

The Third Circuit also noted that the facts of this case implicate the second policy concern underlying *Illinois Brick*—avoidance of "massive evidence and complicated theories" in adjudicating the damages claims of passing-on plaintiffs. *See Illinois Brick*, 431 U.S. at 741; *Hanover Shoe*, 392 U.S. at 493. Here, to prove any damages resulting from the ISF, plaintiffs would have to

> calculate the service fee on each generator set purchased by OMCO, determine how the imposition of the fee and market forces affected the price paid by [plaintiffs], and finally estimate how any increased price affected [plaintiffs'] profits and sales in light of competitive market forces in Saudi Arabia.

713 F.2d 969 (Pet. App. A at 22) (footnote omitted). The court of appeals also recognized that an inquiry into consequential damages allegedly resulting from the ISF, such as plaintiffs' claim for lost profits, would necessarily implicate the same overly complex tracing of the claimed overcharge through the various levels of distribution. *Id.* Only through such an analysis could the ISF be shown to have effected the loss plaintiffs allegedly suffered, as distinguished from the effects of general economic recession, consumer preference, or plaintiffs' own marketing ineptitude. The Third Circuit correctly concluded that the policies stated in *Illinois Brick* foreclosed such a complex, hypothetical damages analysis. *Id.*

Since the Third Circuit correctly applied *Illinois Brick* to the facts of this case, certiorari is not warranted.[16]

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[16] The brief filed on behalf of the amici adds nothing. To the extent that brief addresses the law, it fails to show any variance between the decision below and any decision of this or any other court. To the extent the amici address facts, the facts are seriously misdescribed—perhaps not surprising given amici's lack of access to the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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